

file

BEFORE THE  
STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS

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In the Matter of the Application of )  
Gerald R. Stahl for Water Quality Certification )  
to Place Fill Material in Wetlands for Residential ) 3-SE-94-925  
Development in the City of Oak Creek, Milwaukee )  
County, Wisconsin )

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice hearing was held on June 12, 1996, at Milwaukee, Wisconsin, Jeffrey D. Boldt, Administrative Law Judge presiding.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

Michael J. Cain, Attorney  
P. O. Box 7921  
Madison, Wisconsin 53707-7921

Gerald R. Stahl, by

Andrea Roschke, Attorney  
Weiss, Berzowski, Brady & Donahue  
700 North Water Street  
Milwaukee, Wisconsin 53202-4273

The parties requested the opportunity to submit written closing arguments and the last was received on July 2, 1996.

FINDINGS OF FACT

1. Mr. Gerald R. Stahl, 1020 East Forest Hill Avenue, Oak Creek, Wisconsin, 53154, filed an application with the Department of Natural Resources for water quality certification pursuant to a joint State/Federal application to fill an area of wetlands.

2. The proposed project is located north of East Forest Hill Avenue in the SW 1/4 of the NE 1/4 of Section 16, Township 5 North, Range 22 East, in the City of Oak Creek, Milwaukee County, Wisconsin. The proposed project would affect somewhere between .5 to .8 acres of wetlands.

3. On December 15, 1994, the Department of Natural Resources (the Department or DNR) received a request for contested case hearing from Mr. Stahl relating to the Department's November 29, 1994, denial of water quality certification. On November 7, 1995, the Department forwarded the file to the Division of Hearings and Appeals (the Division) for hearing. The Division set the matter for hearing on December 14, 1995. The applicant requested that the hearing take place sometime after spring thaw of 1996. The hearing was accordingly rescheduled for June 12, 1996.

4. Southeast Wisconsin Regional Planning Commission (SWRPC) Chief Biologist Donald Reed testified that there were hydric soils in the proposed fill area dating back to at least 1966. The existing wetlands have gotten wetter in recent years with new subdivisions and the placement of storm water culverts (an underground culvert west of the project area and an above-ground culvert to the east) near the proposed fill area owned by the applicant. Further, the flushing of fire hydrants in the area has contributed to wetter conditions in the area in recent years. This has had the effect, according to Reed, of making existing wetlands areas wetter. Marshy conditions have replaced wet meadows. Based upon a preponderance of the evidence at hearing, including all of the expert testimony, there is no question that the proposed fill area includes wetlands within the meaning of Wisconsin law.

5. The applicant seeks to develop three lots fronting East Forest Hill Avenue. No other buildable areas abut an open roadway. Development of these lots requires the filling of .52 acres of the above-described wetland area. There is no question that there could be cost savings for Stahl to develop the proposed lots rather than proposed lots 4, 5, and 6. (See: Ex.7) Development of these lots (4-6) might well require greater capital investment because of higher sewage and water costs. Development of lots 4, 5, and 6 would require a crossing of wetland areas, which the Department has indicated it would not oppose, and creation of a private roadway shared by the three lot-owners. This would require a variance from the City of Oak Creek. In general, shared driveways are less desirable because they involve shared problems with snow removal and other possible areas of conflict between homeowners. Nonetheless, these obstacles do not prevent development of these upland lots. Based upon the record as a whole, there is no question that proposed Lots 4, 5 and 6 represent areas which may be available as practicable alternative sites for construction of single family dwellings on the applicant's parcel.

6. While the record reflects that there are pitfalls to developing other areas of property owned by the applicant, he has not carried his burden of showing that there are no practical alternatives available to achieve his project purpose of developing single family residential lots on his property. The information on the cost differential between developing Lots 1-3 and Lots 4-6 is sketchy at best. The applicant presented no testimony from City officials or others sufficient to prove his rough calculations made on Exhibit 7. Further, Ms. Torgerson of the Department testified that she would be willing to approach the City and explain the wetland problems associated with development of the parcel. Torgerson stated that many municipalities show flexibility on such costs when development limitations are understood by City officials. In the absence of any persuasive or

definitive proof on real costs connected with development of other areas on his 20 acre parcel, the applicant has failed to carry his burden of proof in demonstrating that there are no practicable alternatives to filling the wetland areas. Finally, both Reed and Torgerson testified that there is sufficient upland area available to develop a lot south of the wetland area adjacent to East Forest Avenue.

7. The proposed fill for the construction of single family dwellings is not a wetland dependent activity because it does not require water or wetlands to fulfill its basic purpose. (Torgerson) The applicant misinterprets the phrase "wetland dependency" to mean that the project requires a wetland fill to go forward. However, "wetland dependency" is a term of art and is specifically defined as an "...activity that requires location in or adjacent to surface waters or wetlands to fulfill its basic purpose." sec. NR 103 07(2), Wis. Admin. Code. Classic examples of wetland dependent activities would be a boat ramp, or a water intake structure that require water or wetlands to fulfill the basic purpose of the project. Construction of single family homes is not a wetland dependent activity under NR 103.

8. The applicant has not carried his burden of proof in showing that there will not be detrimental impact to the functional values of the wetland. As noted, the wet areas drain a very large area and have become wet to the point where marshes now exist where meadow wetlands existed previously. Torgerson testified that this wetland is adjacent to a navigable stream which is tributary to Oak Creek. Loss of the filtration and storage functions of these wetlands would have a detrimental impact on water quality in the Oak Creek watershed. This watershed has recently been identified as a priority watershed in efforts to improve water quality downstream. (Torgerson)

9. The applicant purchased the subject parcel in 1974. (Ex. 11) Mr. Stahl should have been aware that there was an easement for the City of Oak Creek drainage culvert at the time he purchased his property, as it was entered into by the previous owner in 1958. (Ex. 8)

10. Mr. Stahl stated that his property is now routinely flooded due in part to the clogging of the stream on his property by debris. The growth of wet areas is a particular problem near the vicinity of his daughter's home, which shares a driveway access with the applicant's home. There would appear to be no reason why Stahl could not maintain the stream by routine maintenance and clearing out of debris. Further, the DNR indicated that it would strongly consider granting approval for Stahl to dredge the area to provide for a better drainage ditch and to relieve the back flow of wet areas.

#### CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders relating to water quality certification cases pursuant to sec. 227.43(1)(b), Stats. and NR 299.05(6), Wis. Admin. Code.

2. The proposed fill for construction of a single family dwelling is not a wetland

dependent activity within the meaning of sec. NR 103.07(2) and NR 103.08(4)(a)(1), Wis. Admin. Code. Construction of homes is not an activity that by its nature requires location in or adjacent to surface waters or wetlands to fulfill its basic purpose.

3. Practical alternatives to the fill proposal exist which will not adversely impact wetlands and will not result in other significant environmental consequences. Section NR 103.08(4)(a)(2), Wis. Admin. Code. Practical alternatives means available and capable of being implemented taking into consideration costs, available technology and logistics in light of overall project purposes. NR 103.07(1), Wis. Admin. Code. Taking the above factors into consideration, the applicant has not carried his burden of proof in demonstrating why he could not construct a home on another upland portion of his large parcel.

4. The project does not meet the requirements of NR 103, Wis. Admin. Code because the project is not wetland dependent and because practical alternatives which will not adversely impact wetlands and will not result in significant adverse environmental consequences exist.

5. The proposed project could result in violations of the standards contained in NR 103.08(3)(b)(2)(f), Wis. Admin. Code. Specifically, the proposed project would have detrimental impacts on wetland functional values relating to water quality protection.


6. The subject property is not located within an area of special natural resource interest within the meaning of NR 103.04, Wis. Admin. Code.

#### ORDER

IT IS HEREBY ORDERED that the water quality certification be DENIED because there are other available alternatives which would not involve a detrimental impact to wetlands.

Dated at Madison, Wisconsin on October 31, 1996.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705  
Telephone: (608) 266-7709  
FAX: (608) 267-2744

By   
JEFFREY D. BOLDT  
ADMINISTRATIVE LAW JUDGE

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.